

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000593-001 DT

05/09/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

KEVIN SCOTT WYNN (001)

PAUL M RYBARSYK

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number M-751-TR-2011-000691.**

Defendant-Appellant Kevin Scott Wynn (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends (1) the trial court erred in denying his Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop his vehicle, (2) the State did not present sufficient evidence to support Defendant's conviction, (3) the trial court abused its discretion in its evidentiary rulings, and (4) the State did not properly authenticate the blood test results. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On January 6, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and speed greater than reasonable and prudent, A.R.S. § 28-701(A). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop his vehicle.

Judge Kevin Neal held the hearing on Defendant's motion. (R.T. of Aug. 9, 2011, at 4.) Officer Melissa Martin testified that, on January 6, 2011, she was driving south at about 5 miles per hour on 75<sup>th</sup> Street between Stetson Drive and Indian Plaza. (*Id.* at 35-36.) The posted speed limit there is 25 miles per hour. (*Id.* at 54.) She saw a black sports car (which turned out to be a BMW 650i) drive past her going north at 40 to 45 miles per hour. (*Id.* at 36-37, 51, 53-54.) She made a U-turn and headed north after the vehicle, but lost sight of it. (*Id.* at 41, 43.) The north end of 75<sup>th</sup> Street turns left, so she followed that street and headed west, then turned right and stopped at Camelback Road. (*Id.* at 44-45, 48.) She then saw the black BMW stopped on Camelback Road at the intersection with Miller Road. (*Id.* at 50.) She said that black BMW was a very

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unique car and she had not seen one of that model either before or after this incident. (*Id.* at 51.) She said she was absolutely positive the black BMW she saw stopped there was the same black BMW she saw traveling at 45 miles per hour on 75<sup>th</sup> Street. (*Id.* at 54–55.) She activated her emergency lights, and the driver pulled over. (*Id.* at 52.) She identified Defendant as the driver of this vehicle. (*Id.* at 37.) She asked Defendant if he knew why she stopped him, and he said it was probably because he was speeding. (*Id.* at 52–53, 55.)

Defendant presented the testimony of Dennis James, who was a former police officer and was now an accident reconstructionist. (R.T. of Aug. 9, 2011, at 9.) He gave his opinion that a vehicle could have accelerated to a maximum speed of 30 miles per hour in that area of 75<sup>th</sup> Street under normal acceleration rates. (*Id.* at 11.) He also gave his opinion that a vehicle that had been on 75<sup>th</sup> Street would not have then been at Camelback and Miller Roads within the time frame Officer Martin described. (*Id.* at 14–17.) He acknowledged this testimony was based on certain assumptions he had made. (*Id.* at 18–20.) He further acknowledged he had not spoken to Defendant about this event. (*Id.* at 20.) He also acknowledged he made his calculations based on normal acceleration rates and not acceleration rates for a BMW 650i. (*Id.* at 21–22.)

After hearing arguments from the attorneys, the trial court took the matter under advisement. (R.T. of Aug. 9, 2011, at 59.) On that same day, the trial court issued an Order denying Defendant's Motion To Suppress.

On February 16, 2012, Defendant's attorney submitted a Trial Memorandum, which was also a renewed Motion To Suppress. Judge Orest Jejna denied the renewed Motion To Suppress. (R.T. of Apr. 3, 2012, at 107.)

Judge Lori Patrick presided at the trial in this matter. (R.T. of Apr. 27, 2012, at 110.) Defendant's attorney again renewed his motion to suppress, which the trial court denied. (*Id.*)

Officer again testified she was on duty on January 6, 2011, driving south at about 5 miles per hour on 75<sup>th</sup> Street between Stetson Drive and Indian Plaza. (R.T. of Apr. 27, 2012, at 113–15, 137.) The posted speed limit there is 25 miles per hour. (*Id.* at 115.) She saw a black BMW sports car drive past her going north at 40 to 45 miles per hour. (*Id.* at 116.) She made a U-turn and headed north after the vehicle, but lost sight of it. (*Id.* at 118, 142–43.) The north end to 75<sup>th</sup> Street turns left, so she followed that street and headed west, turned right and stopped at Camelback Road, and saw the black BMW stopped on Camelback Road at the red light with Miller Road. (*Id.* at 118–19, 143–44.) She said she was absolutely positive the black BMW she saw stopped there was the same black BMW she saw traveling at 45 miles per hour on 75<sup>th</sup> Street. (*Id.* at 119, 123, 141, 153–55.) She activated her emergency lights, and the driver pulled over. (*Id.* at 119–20, 145.) She identified Defendant as the driver of this vehicle. (*Id.* at 120.) Officer Martin asked Defendant if he knew why she stopped him, and he said it was probably because he was speeding. (*Id.* at 121, 123, 154.) She noticed an odor of alcohol coming from the vehicle, and noticed Defendant had bloodshot, watery eyes, and slurred speech. (*Id.* at 123.) Officer Thomas later arrived and conducted an HGN test. (*Id.* at 124–25.)

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Officer Martin then placed Defendant under arrest at 2:17. (R.T. of Apr. 27, 2012, at 125, 130.) Officer Martin read to Defendant the Admin Per Se/Implied Consent Affidavit, and Defendant agreed to take a blood test. (*Id.* at 126.) Defendant later changed his mind, so Officer Martin obtained a search warrant. (*Id.* at 126–27.) At 3:45 a.m., a phlebotomist named Michelle drew Defendant’s blood and gave the tubes to Officer Martin, which she labeled and placed in the property refrigerator. (*Id.* at 127–29, 130–32, 147, 190–91.) Officer Martin testified the tubes of Defendant’s blood were continuously in her possession the entire time from when she got them from Michelle until she put them in the refrigerator in the property room. (*Id.* at 132, 148–49, 155.) Officer Martin read the *Miranda* rights to Defendant, and he acknowledged he was driving the vehicle on 75<sup>th</sup> Street and was speeding. (*Id.* at 133–34, 137, 152, 154, 157.)

Officer Tyler Thomas testified he assisted Officer Martin in the investigation of Defendant. (R.T. of Apr. 27, 2012, at 162–63.) He said he noticed an odor of alcohol coming from Defendant’s breath and that his speech was slurred. (*Id.* at 164.) He gave Defendant the HGN test and observed six out of the six possible cues. (*Id.* at 165.) He watched while Michelle drew Defendant’s blood and gave the tubes to Officer Martin. (*Id.* at 166–67.)

Vince Villena testified he was a criminalist for the Scottsdale Police Department. (R.T. of Apr. 27, 2012, at 171.) He obtained the sample of Defendant’s blood from the property room. (*Id.* at 179–80, 187.) He identified the markings on the tubes showing the subject’s name, the initial and badge number of the officer, and the DR number. (*Id.* at 181–82.) He tested the sample of Defendant’s blood, and his test showed Defendant had a BAC of 0.131. (*Id.* at 175, 177, 179, 181–82, 184–85, 187–88.)

After the State rested, Defendant’s attorney made a motion for judgment of acquittal, which the trial court denied. (R.T. of Apr. 27, 2012, at 191, 194.) Defendant presented Nick Flournoy, who testified he was a friend of Defendant’s and had been with him on January 6, 2011. (*Id.* at 195–96.) He said Defendant was not exceeding the speed limit when he drove on 75<sup>th</sup> Street that night. (*Id.* at 197.)

Dennis James again testified for Defendant. (R.T. of Apr. 27, 2012, at 201.) Mr. James acknowledged he had heard Officer Martin testify at the hearing on Defendant’s motion to suppress, and when Defendant’s attorney asked Mr. James if he remembered what Officer Martin had said about how far away she was from the bar in question when she saw Defendant, the prosecutor objected, and the trial court sustained the objection. (*Id.* at 203–04.) Defendant’s attorney asked Mr. James if he had an opinion of the maximum speed a vehicle could reach starting from the bar in question to Officer Martin’s position; the prosecutor objected because there was no testimony to establish where Officer Martin’s position was; and the trial court sustained the objection. (*Id.* at 206.) Defendant’s attorney again asked Mr. James if he remembered what Officer Martin had said at the suppression hearing about how far away she was from the bar in question when she saw Defendant, and again the prosecutor objected. (*Id.* at 206–07.) The trial court sustained the objection as follows:

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THE COURT: I'm going to sustain the objection. Let me just get this on the record. I will sustain the objection. If it didn't happen in this court proceeding, I'm not aware of it, it's not properly in front of me. So, I have no way to judge the credibility of—of that sort of statement.

Try—rephrase the question. I think I know what you're trying to get, but I need you to phrase it properly.

(R.T. of Apr. 27, 2012, at 207.) Defendant's attorney chose instead to go into a different area. (*Id.*) Defendant's attorney asked Mr. James if there was any way the vehicle Officer Martin saw on 75<sup>th</sup> Street could have gotten to Camelback and Miller Roads within the time frame as given by Officer Martin, and the prosecutor objected. (*Id.* at 208.) The trial court sustained that objection because there were not enough facts in evidence to make that sort of calculation. (*Id.* at 208–09.) Defendant's attorney rephrased the question, and Mr. James answered there was no way it could have been the same vehicle. (*Id.* at 209.) When Defendant's attorney asked Mr. James about what was in Officer Martin's report, the prosecutor objected on the basis of hearsay, and the trial court sustained the objection. (*Id.* at 210.) Mr. James then gave his opinion that a vehicle could have accelerated to a maximum speed of 20 miles per hour in that area of 75<sup>th</sup> Street under normal acceleration rates. (*Id.* at 211.)

Defendant presented no other witnesses, and the State had no rebuttal. (R.T. of Apr. 27, 2012, at 224.) After hearing arguments from the attorneys, the trial court found Defendant guilty of both DUI charges and responsible for the civil traffic violation. (*Id.* at 233.) The trial court later imposed sentence. (R.T. of Jun. 5, 2012, at 246–50.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

## II. ISSUES.

A. *Did the trial court abuse its discretion in finding the officer had reasonable suspicion to stop Defendant's vehicle.*

Defendant contends the trial court abused its discretion in finding Officer Martin had reasonable suspicion to stop his vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

The Arizona Supreme Court has said reasonable suspicion requires a particularized and objective basis for suspecting that a person is engaged in criminal activity. *State v. Boteo-Flores*, 230 Ariz. 105, 280 P.3d 1239, ¶ 12 (2012), accord, *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) (police officer has reasonable suspicion to detain person if there are articulable facts for officer to suspect person is involved in criminal activity or commission of a traffic

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offense). The Arizona statutes provide a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence. A.R.S. § 28-1594; A.R.S. § 13-3883(B). The Arizona Court of Appeals has held a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996). As stated by the Arizona Court of Appeals:

It is uncontestable that traveling at any speed over the posted speed limit is a traffic offense and a trooper is justified in stopping a vehicle for the offense.

*State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), *quoting United States v. Garcia*, 897 F.2d 1413, 1419 (7<sup>th</sup> Cir. 1990).

In the present case, Officer Martin testified a black BMW was going 40 to 45 miles per hour in a 25 miles per hour zone. She further testified Defendant was driving the black BMW she stopped and she was absolutely certain the black BMW she stopped was the same black BMW she saw going 45 miles per hour. Based on this testimony, the trial court properly concluded Officer Martin had reasonable suspicion to stop Defendant's BMW.

Dennis James testified (1) under normal acceleration rates, a vehicle could only reach a maximum speed of 30 miles per hour in that area of 75<sup>th</sup> Street, and (2) the black BMW Officer Martin saw at Camelback and Miller Roads could not have been the same black BMW Officer Martin saw on 75<sup>th</sup> Street. This conflicting testimony created a question of credibility for the trial court to resolve. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves "an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge" rather than a "question . . . of law or logic," it is not appropriate for this Court to "substitute [its] judgment for that of the trial judge."

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Defendant contends the trial court should have reconsidered his motion to suppress. The Arizona rules provide as follows:

**d. Finality of Pretrial Determinations.** Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered. Rule 16.1(d), ARIZ. R. CRIM. P. Defendant cites *Cogen v. United States*, 278 U.S. 221 (1929), for the proposition that a trial court has a duty to rehear a motion to suppress. That case dealt with procedure in federal court under federal statutes and rules of procedure, not constitutional law, and thus those rules of procedure in federal court are not binding on a state court.

Defendant asks for relief from this Court based on evidence presented at trial. In reviewing the admissibility of evidence, the appellate court will look only at the evidence presented at the hearing on the motion to suppress, and not to evidence presented at trial. *State v. Hummons*, 227 Ariz. 78, 253 P.3d 275, ¶ 2 (2011). Based on the evidence presented at the hearing on Defendant's Motion To Suppress, this Court concludes the trial court properly denied Defendant's Motion.

**B. Did the State present sufficient evidence to support Defendant's conviction.**

Defendant contends the State did not present sufficient evidence to support his conviction. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, Officer Martin testified Defendant was driving the black BMW; Officer Thomas testified Defendant showed six out of the six possible cues on the HGN test; and Vince Villena testified his test of Defendant's blood sample showed Defendant had a BAC of 0.131. This Court concludes that was sufficient evidence to support Defendant's conviction for the DUI charges. Further, Officer Martin testified the black BMW was going 40 to 45 miles per hour in a 25 miles per hour zone, and she was absolutely sure Defendant's black BMW was the same black BMW she saw on 75<sup>th</sup> Street. Further, Defendant admitted he was speeding. This Court concludes that was sufficient evidence to support Defendant's conviction for speed greater than reasonable and prudent.

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*C. Did the trial court abuse its discretion in its evidentiary rulings.*

Defendant contends the trial court abused its discretion in its evidentiary rulings. Admission of evidence is within the sound discretion of the trial court, and the reviewing court will uphold the trial court's ruling unless there appears to be a clear abuse of discretion. *State v. Prince*, 160 Ariz. 268, 274, 772 P.2d 1121, 1127 (1989).

Defendant contends the trial court erred when it sustained the prosecutor's objection when Defendant's attorney asked Mr. James how fast a vehicle could be going when it passed Officer Martin after it started at the bar in question. The trial court allowed Mr. James to give his opinion that a vehicle could have accelerated to a maximum speed of 20 miles per hour in that area of 75<sup>th</sup> Street under normal acceleration rates. (R.T. of Apr. 27, 2012, at 211.) This Court finds no abuse of discretion in the trial court's rulings.

Defendant contends the trial court erred when it sustained the prosecutor's objection when Defendant's attorney asked Mr. James about what testimony Officer Martin had given at the hearing on the motion to suppress. Defendant's attorney correctly notes Officer Martin gave that testimony in court under oath. "Hearsay" means, however, a statement the declarant does not make while testifying at the current trial or hearing. Rule 801(c)(1), ARIZ. R. EVID. In this case, Defendant's attorney was asking about testimony given in a separate proceeding. This Court again concludes the trial court did not abuse its discretion in its ruling.

Finally, Defendant contends the trial court erred when it sustained the prosecutor's objection when Mr. James was about to testify about what Officer Martin said in her report. (R.T. of Apr. 27, 2012, at 210.) Because Officer Martin's statement in her report was a statement she did not make while testifying at the current trial or hearing, and was being offered to prove the truth of the matter asserted, the trial court properly ruled it was hearsay. Again, this Court finds no abuse of discretion.

*D. Did the State properly authenticate the blood test results.*

Defendant claims the trial court abused its discretion in admitting the blood test results, contending that the State did not establish a chain of custody. A party may establish the condition precedent for the admission of evidence either by chain of custody or identification testimony. *State v. Amaya-Ruiz*, 166 Ariz. 152, 169, 800 P.2d 1260, 1277 (1990) (officer's testimony that exhibit appeared to be clothing he received from defendant, together with testimony from another officer that first officer told him he had received clothing from defendant, and testimony from victim's husband that clothing belonged to defendant, provided sufficient identification for admission of clothing). In the present case, Officer Martin said she received the tubes of Defendant's blood from Michelle and marked them with her name, badge number, and DR number. Vince Villena testified the tubes of blood he tested had those same markings. Further, Officer Martin testified she had the tubes of blood in her possession continuously from when Michelle gave them to her until she put them in the property locker, and Vince Villena testified he got the tubes of blood out of the property locker. This Court concludes the trial court did not abuse its

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discretion in finding the State had properly identified the tubes of blood. *See also State v. Secord*, 207 Ariz. 517, 88 P.3d 587, ¶¶ 17–18 (Ct. App. 2004) (testimony that each person who handled samples had signed for them and that samples were always in police possession was sufficient to show chain of custody).

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) the trial court did not abuse its discretion in finding Officer Martin had reasonable suspicion to stop Defendant's vehicle, (2) the State presented sufficient evidence to support Defendant's conviction, (3) the trial court did not abuse its discretion in its evidentiary rulings, and (4) the State properly authenticate the blood test results.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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